IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. JOHN GAWLEY, Petitioner.	)	2 CA-CR 2007-0128-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20031959

Honorable Frank Dawley, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

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B R A M M E R, Judge.

¶1 After a jury trial, petitioner John Gawley, Jr., was convicted of attempted kidnapping. The trial court sentenced him to the presumptive, 6.5-year prison term. We affirmed Gawley's conviction and sentence on appeal. *State v. Gawley*, No. 2 CA-CR 2004-0041 (memorandum decision filed July 21, 2005). Gawley then filed a petition for post-

conviction relief pursuant to Rule 32, Ariz. R. Crim. P., 17 A.R.S., asserting trial counsel had been ineffective, the trial court had mistakenly believed the sentencing guidelines were mandatory, and the prosecutor had committed misconduct. The trial court summarily denied relief on the latter two claims and subsequently denied relief on the first claim following an evidentiary hearing. This petition for review followed. We will not disturb the trial court's denial of post-conviction relief unless we find it has clearly abused its discretion. *State v. Morgan*, 204 Ariz. 166, ¶ 25, 61 P.3d 460, 467 (App. 2002). We find no abuse here.

¶2 The evidence presented at trial established that Gawley approached the victim, Maria R., who was attending her daughter's dance recital at a Marana high school along with her two sons, and asked her, "You know what's behind my zipper?" Gawley then grabbed Maria's hand and told her he had a gun behind his back, that he "had" one of her sons, and that he would kill her and her son if she did not leave with him. Maria screamed for help and twisted free of Gawley, who then ran away. Following a brief chase, the police found Gawley in a nearby apartment complex.

Ineffective Assistance of Counsel

¶3 In his petition for post-conviction relief, Gawley presented numerous claims of ineffective assistance of trial counsel, many of which he raises again on review, including trial counsel's failure to do the following: object to Maria's zipper comment; cross-examine Maria's son; argue that Maria had signed a release stating she had not suffered any harm; interview certain witnesses listed by the state who did not testify at trial; object to the

prosecutor's reference to the presence of blood on Gawley's pants and to a sidebar conversation about this testimony in the presence of the jury; assert the absence of narcotics on Gawley's person, despite the discovery of a white, powdery substance on him; and call additional witnesses who would have supported Gawley's version of events.

¶4 To establish a claim of ineffective assistance of counsel, a petitioner must show that counsel's performance fell below prevailing professional norms and caused prejudice to the defense. *State v. Ysea*, 191 Ariz. 372, ¶ 15, 956 P.2d 499, 504 (1998). In its minute entry ruling denying relief following the evidentiary hearing, the trial court made the following findings.

> Applying a shotgun approach, the defendant alleges numerous shortcomings of trial counsel. Most fall within the category of alleged omissions such as the failure to cross-examine witnesses on particular points, the failure to bring out favorable information, and the failure to object to certain evidence offered by the State. The court has considered each alleged omission as well as the other suggested errors of trial counsel in the light of the record and finds no basis for relief. Individually and collectively, the allegations fail to establish a basis for awarding a new trial. Many are without support in the record; several are directly contradicted by the record; and the remaining ones are petty and non-prejudicial in nature.

¶5 Noting that it would not separately address each of Gawley's numerous claims, the trial court nonetheless addressed two of them, pointing out that the record clearly refuted the allegations supporting those claims as set forth in Gawley's affidavit, which he had filed in support of his petition for post-conviction relief. In addition, the trial court noted that the relevant portions of Gawley's affidavit that related to the two claims it had

addressed were "not the only portions of the defendant's affidavit that run contrary to the trial record." The court added, "[i]t . . . bears mentioning that the defendant's Rule 32 counsel incorporated these false assertions into her Rule 32 pleadings despite having apparent access to the trial record."

¶6 Based on the nature of Gawley's claims of ineffective assistance of trial counsel, including his conclusory claim on review that "[c]learly counsel's representation of [him] was deficient and fell below the standard of reasonable representation," and the record of the evidentiary hearing, at which Gawley testified, we cannot say the trial court abused its discretion by denying relief and finding Gawley's claims to be "non-prejudicial in nature." We further note that, as the state argued in its response to the petition for post-conviction relief, the record arguably supports a finding that trial counsel had made informed, reasonable, strategic decisions regarding what witnesses to call at trial and the manner in which to examine those witnesses. *See State v. Meeker*, 143 Ariz. 256, 262, 693 P.2d 911, 917 (1984) (proper for counsel not to call witnesses who will not aid defendant's case); *see also State v. Rodriguez*, 126 Ariz. 28, 33, 612 P.2d 484, 489 (1980) ("In general, the power to control trial strategy belongs to counsel."). In fact, at the evidentiary hearing, the state specifically questioned Gawley about trial counsel's tactics as they related to counsel's questioning of Maria and his decision not to question her younger son. Gawley agreed that aggressive questioning of either the victim or a child would not be a wise trial strategy. The trial court, however, did not make specific findings about trial counsel's tactics

or strategy, presumably because counsel did not testify at the evidentiary hearing or submit an affidavit.

¶7 Moreover, although Gawley referred to a claim of ineffective assistance of appellate counsel in his notice of post-conviction relief, a claim he now raises on review, he did not present any such claim in his petition for post-conviction relief. When Rule 32 counsel attempted to raise such a claim at the evidentiary hearing, the judge stated that he was unaware that a claim of ineffective assistance of appellate counsel was before him, a belief Rule 32 counsel was unable to refute. Accordingly, because the petition for post-conviction relief did not contain any claim of ineffective assistance of appellate counsel, nor did the trial court rule on any such claim, we will not address this argument on review. *See* Ariz. R. Crim. P. 32.9(c)(1)(ii).

Sentencing

¶8 At sentencing, the trial court relied on A.R.S. § 13-604.02(B), which requires that any person who commits a crime while on probation be sentenced to at least the presumptive prison term and that the sentence be served consecutively to the sentence for which the offender had been released at the time of the offense. After being advised at sentencing of his right to have the court determine his release status and that the court was required to impose the presumptive, 6.5-year sentence if Gawley admitted he had committed this offense while on probation, Gawley admitted he had, in fact, been on probation when he committed this offense. Later in the hearing, the trial court apparently "forgot" that it

was required to impose the presumptive sentence and instead found that, in light of mitigating factors, it would sentence Gawley to a somewhat mitigated, five-year sentence. The prosecutor immediately reminded the trial court that it could not impose a mitigated sentence, presumably based on § 13-604.02(B); the court agreed, and defense counsel did not object. The court then imposed the presumptive sentence required by § 13-604.02(B). On review, Gawley argues that the presumptive sentence was improper because the prosecutor "usurped the judge's role" by misinforming him about the sentencing guidelines, and cites federal cases for the proposition that he "received an illegal sentence."

¶9 The trial court properly denied Gawley's claim for two reasons: (1) it found Gawley's argument to be precluded because he could have raised it on appeal, *see* Ariz. R. Crim. P. 32.2(a)(1) and (3), and (2) Gawley "failed to establish any legal authority to support his wish that the mandatory sentencing statutes must be treated by the court as guidelines rather than legislative mandates." Based on preclusion, we conclude the trial court did not abuse its discretion by denying Gawley's sentencing claim. *See* Ariz. R. Crim. P. 32.2(a)(1) and (3).

Prosecutorial Misconduct

¶10 Gawley also contends on review, as he did below, he was entitled to relief based on prosecutorial misconduct. He contends the prosecutor permitted Maria to refer to Gawley's zipper comment for the first time at trial; presented irrelevant and prejudicial evidence about the presence of blood on Gawley's pants; failed to call Maria's younger

child, who was a key witness to the incident, to testify at trial; and "direct[ed]" the judge to impose the presumptive sentence, thereby "impermissibly usurp[ing] the role of the judge." The trial court correctly found these claims precluded because, although Gawley could have raised them on appeal, he did not. *See* Ariz. R. Crim. P. 32.2(a)(1) and (3).

¶11 Accordingly, although the petition for review is granted, relief is denied.

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J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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JOSEPH W. HOWARD, Presiding Judge